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OPINIONS

MCI Telecommunications, Corp. v. Public Service Commission of Utah, Tenth Circuit Court of Appeals, No. 99-4203; 216 F. 3d 929.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MCI TELECOMMUNICATIONS CORPORATION, a Delaware corporation,

Plaintiff - Appellee,

US WEST COMMUNICATIONS, INC., a Colorado corporation,

Plaintiff-Counter-Defendant - Appellee,

v.

PUBLIC SERVICE

FILED
United States Court of Appeals
Tenth Circuit
JUN 20 2000

PATRICK FISHER
Clerk

No. 99-4203

COMMISSION OF UTAH;
STEPHEN F. MECHAM;
CONSTANCE B. WHITE;
CLARK D. JONES,
Commissioners of the Public Service Commission of Utah,

Defendants - Appellants,

and

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., a New York corporation,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D. Ct. No. 98-CV-490)

Sandy J. Mooy, Utah Public Service Commission (Annina Mitchell, Assistant Attorney General, with her on the briefs), Salt Lake City, Utah, appearing for Defendants-Appellants.

Mark B. Stern, Attorney (William B. Schultz, Acting Assistant Attorney General, David J. Schwendiman, United States Attorney, Susan L. Pacholski, Attorney, Christopher J. Wright, General Counsel, John E. Ingle, Deputy Associate General Counsel, and Susan L. Launer, Deputy Associate General Counsel, with him on the brief), Appellate Staff Civil Division, Department of Justice, Washington, DC, appearing for the Defendant-Intervenor-Appellee.

Paul M. Smith, Jenner & Block, Washington, DC (Thomas F. O'Neil, III and William Single, IV, MCI Worldcom, Inc., Washington, DC, J. Alex Ward, Jenner & Block, Washington, DC, counsel for MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc.; Phillip L. Douglass, US West Law Department, Denver, Colorado, and Kara Sacilotto, Perkins, Coie LLP, Washington, DC, counsel for US West Communications, Inc.; Daniel Waggoner, Davis, Wright, Tremaine, LLP, Seattle, Washington, Thomas Pelto and Rebecca DeCook, AT&T Communications, Denver, Colorado, counsel for AT&T Communications of the Mountain States, Inc., with him on the brief), appearing for Appellees.

Before **TACHA**, **BALDOCK**, and **BRORBY**, Circuit Judges.

TACHA, Circuit Judge.

Defendants-appellants the Utah Public Service Commission (UPSC) and the individual commissioners appeal the district court's denial of their motion to dismiss on Eleventh Amendment immunity grounds. Defendants also contest the district court's conclusion that it has jurisdiction to consider US West's takings claim. We exercise jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291 and the collateral order doctrine, see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993), and affirm. We do not reach the merits of

defendants' argument on the takings claim.

I. Telecommunications Act of 1996

A. History

This case arises under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 2000)) ("1996 Act" or "Act"). The 1996 Act amended the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 2000)) ("1934 Act"). Congress adopted the 1934 Act "to protect American consumers against AT&T which, through an aggressive policy of consolidation, had gained a virtual monopoly over all segments of the telecommunications industry. Telephone service as a whole was viewed as a natural

monopoly which needed to be regulated for the benefit of all users." Michael Kerf & Damien Geradin, Controlling Market Power in Telecommunications: Antitrust vs. Sector-Specific Regulation: An Assessment of the United States, New Zealand and Australian Experiences, 14 Berkeley Tech. L.J. 919, 936 (1999). Thus, pursuant to the 1934 Act, Congress created the Federal Communications Commission (FCC), and gave that agency jurisdiction to regulate interstate telephone services. See Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C.A. § 151) (creating the FCC and giving it authority over "interstate and foreign commerce in communication by wire and radio").

The 1934 Act left regulation of intrastate

telephone services to the states. See id. § 2(b) (codified as amended at 47 U.S.C.A. § 152) (denying the FCC jurisdiction "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier"). In regulating local phone service,

> [s]tates typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). Most of the LECs were part of AT&T's Bell System and were known as Bell Operating Companies ("BOCs"). Kerf & Geradin,

14 Berkeley Tech. L.J. at 937.

"As the telephone industry developed in the 1950s and 1960s, many began to challenge the basic premise that telephone service was a natural monopoly." Id. Eventually, potential competitors and the Department of Justice sued AT&T to dismantle its virtual monopoly. Pursuant to a 1982 consent decree, AT&T agreed to divest the local BOCs and reorganize them into subsidiaries of seven independent local exchange carriers, known as regional BOCs. See United States v. Western Elec. Co., 569 F. Supp. 1057, 1061-62 & 1062 n.5 (D.D.C. 1983), aff'd sub nom. California v. United States, 464 U.S. 1013 (1983). In exchange, AT&T was permitted, among other things, to compete with virtually no restrictions in long-distance

services. Kerf & Geradin, 14 Berkeley Tech. L.J. at 938.

While the 1982 consent decree fostered competition in the long-distance market, technological advances occurred that made "competition among multiple providers of local service seem possible." AT&T Corp., 952 U.S. at 371. Thus, by 1994, "[m]any states had already commenced their own efforts to deregulate the telecommunications industry" by permitting local competition. Deonne L. Bruning, The Telecommunications Act of 1996: The Challenge of Competition, 30 Creighton L. Rev. 1255, 1258 (1997). In 1996, Congress passed the Telecommunications Act to further encourage local competition. See Jim Chen, The Magnificent Seven: American Telephony's

Deregulatory Shootout, 50 Hastings L.J. 1503, 1514 (1999) ("The Act sought to unleash three of the most deeply entrenched monopolists in the American economy–local exchange carriers, interexchange carriers, and cable system operators–on each other's markets in the hope that competition among the large would dissolve these industrial giants.") In so doing, Congress "fundamentally restructure[d] local telephone markets" and "ended the longstanding regime of state-sanctioned monopolies." AT&T Corp., 952 U.S. at 371.

B. 47 U.S.C.A. §§ 251-252

1. Section 251

To accomplish the goals of the Act, Congress "establish[ed] baseline rules for every company that want[s] to provide telecommunications service."

Bruning, 30 Creighton L. Rev. at 1258. Specifically, 47 U.S.C.A. § 251 imposes various duties on incumbent LECs to facilitate market entry. Because incumbents own the current network, "[f]oremost among these duties is the [incumbent] LEC's obligation . . . to share its network with competitors." AT&T Corp., 952 U.S. at 371; see 47 U.S.C.A. § 251(c). Congress deemed network sharing, or interconnection, necessary "so that all customers, even those served by a competitor, can seamlessly and transparently make and receive calls." Bruning, 30 Creighton L. Rev. at 1259. Section 251 thus requires incumbents to negotiate interconnection agreements with entrants in good faith. See 47 U.S.C.A. § 251(c)(1).

2. Section 252

Under § 252, an incumbent and a new carrier may privately agree on the terms of an interconnection agreement. See id. § 252(a)(1). If private negotiation fails, then either party can petition the state commission that regulates local phone service to arbitrate any open issues. Id. § 252(b)(1). Whether an agreement is adopted by negotiation or arbitration, it must be submitted to the state commission. Id. § 252(e)(1). The state commission then must approve or reject the agreement. Id.

A state commission may reject a negotiated agreement only if it discriminates against non-party carriers or is inconsistent with the public interest, convenience, and necessity. Id. § 252(e)(2)(A). On the other hand, a state commission may reject an arbitrated

agreement only if the agreement does not comply with § 251, including the regulations prescribed by the FCC pursuant to § 251, or the pricing standards set forth in § 252(d). Id. § 252(e)(2)(B).

If a state commission does not approve or reject an agreement within specified time periods, then the agreement is deemed approved. Id. § 252(e)(4). However, if a state commission "fails to act to carry out its responsibility under [§ 252]," then the FCC will preempt the state commission's jurisdiction over that proceeding and assume the state commission's responsibility. Id. § 252(e)(5).[1] If a state commission

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[1]A state commission "fails to act" if it "fails to respond, within a reasonable time, to a request for mediation . . . or . . . a request for arbitration . . . or fails to complete an arbitration within the time limits established in section 252(b)(4)(C)." 47 C.F.R. § 51.801(b) (1999). A state commission does not fail to act "if an agreement is deemed

does act, any party "aggrieved" by its determination "may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 [and section 252]." Id. § 252(e)(6). State courts do not "have jurisdiction to review the action of a State commission in approving or rejecting an agreement." Id. § 252(e)(4). If a state commission fails to act and the FCC asserts jurisdiction, then "the proceeding by the [FCC] . . . and any judicial review of the [FCC's] actions shall be the exclusive remedies." Id. § 252(e)(6).

Thus, § 252 allows a state to choose whether it will participate in the federal regulatory scheme. If a

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approved under section 252(e)(4)." Id. § 51.801(c). Thus, if a state commission does not approve or reject an agreement and it is deemed approved, the FCC cannot preempt the state commission's jurisdiction and review the agreement.

state elects to regulate interconnection agreements through its state commission, then the state is subject to suit in federal court.

II. Facts

On July 26, 1996, AT&T Communications of the Mountain States, Inc. ("AT&T"), filed a petition with the UPSC for arbitration with US West Telecommunications, Inc. ("US West") pursuant to § 252(b) of the Act. On September 3, 1996, MCI Metro Access Transmission Services, Inc. and MCI Telecommunications Corp. (collectively MCI) filed a similar petition for arbitration with US West. After consolidating the AT&T and MCI petitions, the UPSC issued an arbitration order resolving a number of open issues. The order directed the parties to file fully

executed interconnection agreements with the UPSC that were consistent with the UPSC's resolution of the parties' disputes. The UPSC then reviewed and approved the submitted interconnection agreements pursuant to 47 U.S.C.A. § 252(e).

US West subsequently filed suit against AT&T, MCI, the individual commissioners, and the UPSC in federal district court. US West challenged some provisions in its interconnection agreements with MCI and AT&T, raised a takings claim and sought declaratory and injunctive relief. On the same day, MCI filed suit against US West, the individual commissioners and the UPSC. After the district court consolidated the suits, the individual commissioners and the UPSC moved to have themselves dismissed from US West's

suit pursuant to Fed. R. Civ. P. 12(b).[2] Defendants claimed that they were immune from suit under the Eleventh Amendment and that the district court did not have jurisdiction over US West's takings claim. The district court denied the motion, concluding that it had jurisdiction over defendants and the takings claim.

III. Eleventh Amendment Immunity

"We review de novo a district court's denial of a state's claim of Eleventh Amendment immunity from suit in federal court." Innes v. Kansas State Univ., 184 F.3d 1275, 1277 (10th Cir 1999), cert. denied, __ U.S. __, 120 S. Ct. 1530 (2000).

The Eleventh Amendment to the U.S. Constitution provides: "The Judicial power of the

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[2]Based on a stipulation reached with MCI, defendants did not move to have themselves dismissed from MCI's suit.

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has construed the Eleventh Amendment to mean that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

However, state sovereign immunity is not absolute. First, a state may not assert an Eleventh Amendment defense where Congress has properly abrogated its immunity. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996). Second, a state may waive its sovereign immunity by consenting to suit in

federal court. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 2223 (1999). Third, a private party may sue a state officer for prospective injunctive or declaratory relief from an ongoing violation of the Constitution or federal laws. See Ex parte Young, 209 U.S. 123, 159-60 (1908); see also Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 2267 (1999) (affirming the continuing vitality of Ex parte Young).

IV. Analysis

Defendants contend that none of the limits on sovereign immunity apply to them, and that therefore they are immune from suit. The district court found that the UPSC waived its sovereign immunity when it opted to participate in the statutory scheme set forth in the Act.

The district court also found that the individual commissioners were subject to suit under Ex parte Young. We agree with both findings.[3]

A. Waiver

1. Means of Waiver

Generally, a state may waive its Eleventh Amendment immunity in one of two ways. First, a state waives its immunity if it voluntarily invokes the

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[3]The district court's opinion mentions abrogation in passing, and on appeal defendants' briefly argue that Congress could not have constitutionally abrogated state sovereign immunity through passage of the Act. Congress may abrogate the states' sovereign immunity in the exercise of its Section 5 power to enforce the Fourteenth Amendment. College Sav. Bank, 119 S. Ct. at 2224. After Seminole Tribe, however, "Congress may not abrogate state sovereign immunity pursuant to its Article I powers." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 2205 (1999). There is no question that Congress adopted both the 1934 Act and the 1996 Act pursuant to its Article I commerce power. Thus, we agree with defendants that Congress could not and did not abrogate the states' sovereign immunity under the 1996 Act.

jurisdiction of a federal court. See College Sav. Bank, 119 S. Ct. at 2226. Second, a state waives its immunity if it "makes a clear declaration that it intends to submit itself to [a federal court's] jurisdiction." Id. (internal quotation marks and citation omitted).

A state can make a "clear declaration" of its consent to be sued in federal court by expressly waiving its immunity through a state statute or constitutional provision. See Innes, 184 F.3d at 1278. A state can also declare its intent to submit to suit by impliedly or constructively waiving its immunity if the declaration is clear and altogether voluntary. See generally College Sav. Bank, 119 S. Ct. 2219 (overruling the constructive waiver doctrine of Parden v. Terminal Ry. of Ala., 377 U.S. 184 (1964), but recognizing that a state may still

constructively or impliedly waive its immunity in certain circumstances); see also Innes, 184 F.3d at 1280 (stating that nothing in College Savings Bank forecloses us from examining the underlying facts of a case to determine whether a state has unequivocally expressed its intent to waive its immunity).

Here, US West sued the UPSC and the individual commissioners. Accordingly, Utah did not invoke the jurisdiction of a federal court and thereby waive its immunity. Furthermore, Utah did not expressly consent to suit through a state statute or constitutional provision governing this case. See Utah Code Ann. § 63-30-16(1) (Supp. 1999) (providing that Utah state district courts have exclusive original jurisdiction over suits brought against the state); Sutton v. Utah State Sch. for the Deaf

& Blind, 173 F.3d 1226, 1233 (10th Cir. 1999) ("Utah has not waived its Eleventh Amendment immunity by statute."). Thus, the question is whether, under College Savings Bank, Utah constructively waived its immunity from suit when it arbitrated an interconnection dispute between US West, AT&T and MCI pursuant to § 252 of the Act.

2. College Savings Bank

Because College Savings Bank overruled Parden's constructive waiver doctrine, we begin with a brief discussion of Parden. In Parden, the employees of a railroad owned and operated by the State of Alabama sued the railroad under the Federal Employer's Liability Act (FELA). 377 U.S. at 184-85. Alabama asserted a sovereign immunity defense. Id. The Supreme Court

held that Alabama had waived its immunity because FELA conditioned a state's right to operate a railroad in interstate commerce upon amenability to suit in federal court. Id. at 192. Since Alabama chose to operate a railroad in interstate commerce, it impliedly accepted the conditions imposed by the act, including the condition that it consent to suit. Id.

In College Savings Bank, a New Jersey bank sued the Florida Prepaid Postsecondary Education Expense Board ("Florida Prepaid"), an arm of the State of Florida. 119 S. Ct. at 2223. Florida Prepaid administers a program designed to ensure that individuals have sufficient funds to finance a college education. Id. The bank claimed that Florida Prepaid misrepresented its product in its marketing brochures

and annual reports in violation of the Lanham Act. Id. As amended by the Trademark Remedy Clarification Act (TRCA), the Lanham Act provides that states are not immune from suit in federal court for violations of the Act. Id. Florida Prepaid claimed, however, that it was immune from suit because the TRCA was enacted pursuant to Congress's Article I power and Congress may not abrogate state sovereign immunity when it legislates under Article I. Id. at 2224. The bank contended that, under Parden, Florida Prepaid had waived its immunity when it engaged in the interstate marketing and administration of its program after the TRCA made it clear that such activity would subject Florida Prepaid to suit. Id. The Court overruled Parden and concluded that Florida Prepaid had not waived its

immunity. See id. at 2226-28.

The Court reasoned that it could not "square Parden with [its] cases requiring that a State's express waiver of sovereign immunity be unequivocal." Id. at 2228 (citing Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944)). "The whole point of requiring a 'clear declaration' by the State of its waiver is to be certain that the State in fact consents to suit." Id. Where Congress clearly expresses its intention that if a state takes certain action it will waive its immunity, "the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals." Id. However, this "is very far from concluding that the State made an 'altogether voluntary' decision to waive its immunity." Id.

Furthermore, if the Court recognized "a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers," it would thereby "permit Congress to circumvent the antiabrogation holding of Seminole Tribe." Id. at 2229 (emphasis added). "Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin." Id. (emphasis added).[4]

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[4]Defendants contend that College Savings Bank precludes Congress from using its commerce power to obtain a constructive or implied waiver from a state. They therefore argue that because Congress adopted the 1996 Act pursuant to its commerce power, § 252 cannot permissibly require states to constructively or impliedly waive their sovereign immunity. We disagree. The key to constructive or implied waiver under College Savings Bank is the voluntariness of the state waiver, not the particular power pursuant to which Congress enacted the statute. Under College Savings Bank, Congress may not exact or force a waiver from a state pursuant to any of its Article I powers.

Thus, for a constructive waiver of sovereign immunity to be valid under College Savings Bank, it must be altogether voluntary and not forced from a state by Congress. A constructive waiver is voluntary only where Congress threatens a state with the denial of a "gift or gratuity" if the state refuses to consent to suit in federal court. See id. at 2231. Where Congress threatens a state with a "sanction" if it refuses to consent to suit, then the waiver is no longer freely given. See id. In addition, it may be that the difference between a gift and a sanction disappears when the gift Congress threatens to withhold is large enough. See id.

To illustrate its holding in College Savings Bank, the Court distinguished the legitimate conditions Congress placed on states in Petty v. Tennessee-

Missouri Bridge Comm'n, 359 U.S. 275 (1959), and South Dakota v. Dole, 483 U.S. 203 (1987), from the forced waivers in Parden and the case at bar. In Petty, the Court held that a bistate commission created pursuant to an interstate compact "had consented to suit by reason of a suability provision attached to the congressional approval of the compact." College Sav. Bank, 119 S. Ct. at 2231 (citing Petty). In Dole, the Court held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." Id. (citing Dole).

The College Savings Bank court explained that

the bistate commission's waiver was valid because, under the Compact Clause of the U.S. Constitution, states may not form an interstate compact without the consent of Congress. Id.

The granting of consent therefore is a gratuity. Id. Similarly, "Congress has no obligation to disburse funds to the States; such funds are gifts." Id.

In contrast, in both Parden and the case before the Court, Congress did not threaten the denial of a gift or gratuity if the states refused to waive their sovereign immunity. See id. Instead, in both Parden and College Savings Bank, Congress threatened a sanction: "exclusion of the State from otherwise permissible activity." Id. Specifically, the federal statute in Parden required Alabama to waive its immunity or give up its

ability to own and operate a railroad in interstate commerce. In College Savings Bank, the TRCA required Florida to waive its immunity or give up its ability to engage in the business of advertising and selling a for-profit educational investment vehicle. The voluntariness of a waiver is destroyed "when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." Id.; see also Innes, 184 F.3d at 1284 (holding that a state university "knowingly and voluntarily" waived the state's immunity "by agreeing, as a prerequisite to its participation in the Perkins Loan program, to undertake certain enumerated actions in federal bankruptcy court in the event of a claim for discharge filed by the student-borrower").

3. Application of College Savings Bank

47 U.S.C.A. § 252 invites states to participate in the federal government's regulation of local telephone service. Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity. See 47 U.S.C.A. § 252(e)(6) ("In any case in which a State commission makes a determination under [§ 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court . . . ."); see also id. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.").[5] Thus, § 252 puts Utah on notice that

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[5]Utah's Governmental Immunity Act provides that "state" "means the state of Utah, and includes any . . .

Congress intends to subject it to suits brought by individuals if it acts under § 252. See College Sav. Bank, 119 S. Ct. at 2228. College Savings Bank, however, makes it clear that Congress's intent to effect a waiver is insufficient, standing alone, to render a state's waiver altogether voluntary. Id.

Instead, Utah has voluntarily waived its immunity only if Congress, through the 1996 Act, threatened it with the denial of a gratuity, rather than the imposition of a sanction. Prior to 1996, the states were permitted to regulate local phone service. Indeed, the

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commission." Utah Code Ann. § 60-30-2(9) (Supp. 1999). The UPSC therefore has the authority to act on behalf of Utah and can waive Utah's sovereign immunity. See Innes, 184 F.3d at 1284 (stating that even where a court finds a waiver of state sovereign immunity, it must determine if the waiver is valid by examining whether the defendant had the authority to waive the state's immunity).

1934 Act specifically left regulation of intrastate telephone services to the states. However, the 1996 Act preempted state regulatory authority over some aspects of local phone service. See AT&T Corp., 525 U.S. at 730 n.6 (stating that "[w]ith regard to matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States"). Although it did not do so, Congress could have preempted all state regulation of local phone service. See FERC v. Mississippi, 456 U.S. 742, 764 (1982) ("[T]he commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290-91 (1981).

Thus, with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in Petty and Dole, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.[6] We therefore hold

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[6]Defendants contend that Congress has imposed a sanction on them because if they refuse to consent to suit, Utah will be excluded completely from the regulation of interconnection agreements. They suggest that in this case, the difference between the denial of a gratuity and the imposition of a sanction has disappeared since Congress threatens to withhold such a substantial amount of regulatory authority. Seizing on language in College Savings Bank, they argue that the inducement offered by Congress is "so coercive as to pass the point at which pressure turns into compulsion." 119 S. Ct. at 2231 (internal quotation marks

that Utah voluntarily waived its sovereign immunity

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and citations omitted). This argument is without merit.

The size of the "gift" was not at issue in College Savings Bank because "the point of coercion [was] automatically passed" when Congress conditioned participation in an otherwise lawful activity on a state's consent to suit. Id. Thus, the Court's discussion of the coercion theory was merely dicta. See Kansas v. United States, __ F.3d __, 2000 WL 710489, at *6 (10th Cir. June 1, 2000) ("[T]he coercion theory is unclear, suspect, and has little precedent to support its application.").

Moreover, § 252 removes only a slice of regulatory authority from a state if it declines to waive its sovereign immunity. For example, to ensure that barriers to competition will fall, § 253 prohibits all state statutes and regulations that impede "the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C.A. § 253(a). Thus, § 253(a) effectively "strikes down all franchised monopolies that were given by the states to local exchange companies." Kerf & Geradin, 14 Berkeley Tech. L.J. at 940. However, § 253(b), captioned "State regulatory authority," contains a broad exception which provides that nothing in § 253 "shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus, state commissions may continue to regulate telecommunications in the public interest, as long as such regulations are competitively neutral.

when the UPSC, through its commissioners, arbitrated the interconnection dispute in this case.[7] Defendants are subject to suit in federal court, and this case may proceed.

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[7]The district courts are divided over whether, under College Savings Bank, a state waives its sovereign immunity when it accepts Congress's invitation to participate in the review of interconnection agreements under § 252. See, e.g., Bell Atlantic-Del., Inc. v. McMahon, 80 F. Supp.2d 218, 231-33 (D. Del. 2000) (finding a waiver); Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis., 57 F. Supp.2d 710, 714-16 (W.D. Wis. 1999) (finding no waiver). We are unaware of any circuit court that has decided this issue. See MCI Telecomms. Corp. v. Illinois Commerce Comm'n, 183 F.3d 558, 564-67 (7th Cir. 1999) (finding a constructive waiver), vacated and reh'g granted, 183 F.3d 567 (7th Cir. 1999) (ordering the parties to file supplemental briefs addressing the applicability of Alden v. Maine, 527 U.S. 706 (1999), College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999), and Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999)); see also GTE North, Inc. v. Strand, 209 F.3d 909, 2000 WL 424028, at *12 n.6 (6th Cir. Apr. 20, 2000) (stating in dicta that "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity" after College Savings Bank and Florida Prepaid).

C. Ex Parte Young

Even if the Eleventh Amendment barred US West's suit against the UPSC, US West still could proceed with its suit against the individual commissioners. In a suit similar to the one at bar, the Sixth Circuit found that the matter before it was "a straightforward Ex parte Young case." Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F.3d 862, 867 (6th Cir. 2000). We conclude that the instant suit is also a straightforward Ex parte Young case and adopt the Sixth Circuit's rationale and holding:

> The Ex parte Young doctrine operates as an exception to the general rule of sovereign immunity that states may only be sued with their consent. Under Ex parte Young, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment. Ex parte Young, 209 U.S. at 159-60. The [UPSC] not only approved the

> interconnection agreement[s], it is responsible for ongoing enforcement of the agreement[s]. [US West] alleges that the agreement[s] violate[]federal law, and is seeking equitable relief [against the commissioners]. . . . Under Ex parte Young, [US West] is entitled to proceed.
>
> Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) and Idaho v. Coeur d'Alene Tribe, 521 U.S. 261(1997), do not affect the application of Ex parte Young to § 252 cases. Recently, the Supreme Court once again affirmed the vitality of Ex parte Young, even while strongly reaffirming states' rights against suit. See Alden v. Maine, 119 S. Ct. 2240, 2266-68 (1999) ([stating that] sovereign immunity does not bar certain actions against state officers for injunctive or declaratory relief).

Id. at 867-68 (parallel citations omitted).[8] Thus, we

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[8]Defendants contend that Seminole Tribe and Coeur d'Alene Tribe narrowed the Ex parte Young doctrine so as to make it inapplicable to this case. We have recognized that "Coeur d'Alene Tribe imposes an important additional requirement" upon the application of Ex parte Young. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1286 (10th Cir. 1999). Now, in an Ex parte Young case, "[w]e must examine whether the relief Plaintiff[] seek[s] against the state officials implicates special sovereignty interests, and whether that requested relief is the functional equivalent to a form of legal

hold that under Ex parte Young, the Eleventh Amendment does not bar US West's suit against the individual commissioners.

V. US West's Takings Claim

In its first amended complaint, US West claimed that the contractual provisions imposed upon it by the UPSC constitute a taking of its property for public use without just compensation in violation of the Fifth and Fourteenth Amendments. US West sought relief under 42 U.S.C. § 1983. Defendants moved to dismiss US West's takings claim under Fed. R. Civ. P. 12(b), and

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relief against the state that would otherwise be barred by the Eleventh Amendment." Id. (internal quotation marks and citations omitted). In this case, US West requests declaratory and injunctive relief to remedy actions by the commissioners which it claims are violations of federal law. Such relief would not affect any special sovereignty interests or otherwise cause offense to Utah's sovereign authority. Defendants' argument therefore is without merit.

the district court determined that it had jurisdiction over the claim. On appeal, defendants argue that US West cannot raise its takings claim in federal court until it attempts to obtain compensation through state procedures or pleads that it would be futile to do so. They claim that because US West has not yet gone through state channels, the takings claim is not ripe and the district court therefore does not have jurisdiction over it.

We find no indication in the record that defendants made this argument to the district court. Moreover, the district court did not discuss ripeness in its memorandum order denying defendants' motion to dismiss. The lower court merely found that US West brought its claim under the Fourteenth Amendment and

42 U.S.C. § 1983. The district court concluded that "[t]hese are appropriate channels for such claims and this Court has the proper jurisdiction to hear them." Mem. Order at 7. Whether the claim is ripe for judicial review is another question, one that the district court apparently did not address.

We see no reason to "depart from the general rule that 'a federal appellate court does not consider an issue not passed upon below.'" Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992) (quoting Singleton v. Wulff, 428 U.S. 106, 120 (1976)). We therefore decline to consider the merits of defendants' ripeness argument. The ripeness issue will be before the district court on remand.

AFFIRMED AND REMANDED.

U S West Communications, Inc. v. Public Service Commission of Utah, et al, 991 F. Supp. 1299 (D. Utah 1999)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

U S West Communications Inc. :
Plaintiff
:MEMORANDUM ORDER
VS.
:
Stephen F. Mecham, Constance White, Clark Jones, Commissioners of the Public: Service Commission of Utah; Utah Public Service Commission; AT&T Communications of the Mountain States, Inc.; and MCIMetro Access Transmission :
Services, Inc. :Case No. 2:98cv00490
Defendants :

MCI Telecommunications Corp. and :
MCI Metro Access Transmission :FILED
Services, Inc :Clerk, U.S. District Court
Plaintiffs :20 Sept 99 PM 1:13
VS.

:DISTRICT OF UTAH
:BY: DEPUTY CLERK

U S West Communications, Inc., the
Public Service Commission of Utah, and:
Stephen F. Mecham, Constance White,
Clark Jones, Commissioners of the Public:
Service Commission of Utah

:Case No. 2:98cv00488

Defendants

Before the Court is Defendant Public Service Commission of Utah and Defendants Stephen F. Mecham, Constance White, Clark Jones, Commissioners of the Public Service Commission of Utah's Motion to Dismiss filed pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*. The matter came on for hearing on Monday, August 9, 1999. Sandy Mooy appeared for Defendants Public Service Commission of Utah and Stephen F. Mecham,

Public Service Commission of Utah. David Jordan appeared for Defendant U S West Communications Inc. Matthew Pachman appeared for Plaintiff MCI Telecommunications Corp. And MCI Metro Access Transmission Services, Inc. Daniel Waggoner appeared for Defendant AT&T Communications of the Mountain States, Inc. David Zaring appeared for the U.S. Department of Justice, Federal Programs Branch. Oral argument was heard and the matter was taken under advisement. The Court has carefully considered all pleadings, memoranda, and other materials submitted by the parties. The Court has further considered the law and facts relevant to the all motions. Now being fully advised, the court enters the following order.

I. BACKGROUND

In February 1996, Congress passed the Telecommunications Act of 1996 (The "ACT") which was intended to promote competition and reduce regulation in local telephone markets.

The ACT requires incumbent telephone carriers to allow new carriers access to certain equipment necessary to start or run a telephone company. To accomplish the designs of the ACT, Congress requires that all involved parties negotiate in good faith on the terms of an agreement that would meet the requirements of the ACT. If negotiations prove unsuccessful, either party has the option of requesting arbitration by the public service commission. If the public service commission declines to arbitrate, the Federal

Communications Commission (FCC) steps in. If either party is unhappy with the arbitration results, they may appeal to the appropriate federal district court for review of the arbitrator's findings.

On July 26, 1996, AT&T Communications of the Mountain States, Inc. (AT&T), filed a petition for arbitration with the Utah Public Service Commission (the "Commission") for arbitration with U S West Communications, Inc. ("U S West") pursuant to section 252(b) of the ACT. On September 3, 1996, MCI Metro Access Transmission Services, Inc. And MCI Telecommunications Corp.)"MCI") filed a petition for arbitration with the Commission for arbitration with U S West pursuant to section 252(b) of the Act. The Commission consolidated the AT&T and MCI petitions

for arbitration and proceeded.

On April 28, 1998, the Commission issued an Arbitration Order resolving a number of issues and requiring the parties to file fully executed interconnection agreements consistent with the Arbitration Order. Each of the parties filed separate, fully executed interconnection agreements with the Commission and sought reconsideration of a number of issues. On June 9, 1998, the Commission issued its Order on Reconsideration.

On July 9, 1998, U S West filed suit against AT&T, MCI, the individual Commissioners and the Commission seeking review of the Arbitration Order. Also on July 9, 1998, MCI filed suit against U S West, the individual Commissioners and the Commission. The

two suits were consolidated and the Commission filed this motion.

II. DISCUSSION

Jurisdiction over the Individual Commissioners

The Commission argues that the Eleventh Amendment to the United States Constitution bars this action against the individual Commissioners. They reason that since the Commissioners were acting in their official capacities, any suit against them should be brought against their employer the state. Because the state has immunity, the individual Commissioners are also protected. The Commission further argues that a recent United States Supreme Court decision *Alden v. Maine,* 119 S. Ct. 2240 (1999), so limits the Eleventh Amendment exception set forth in *Ex parte Young,* 113

S. Ct. 684 (1908), that the exception does not apply to the individual Commissioners in the present case.

A closer reading of *Alden* reveals that the Supreme Court did just the opposite. Instead of limiting the *Ex parte Young* doctrine, the Supreme Court emphasized its importance in modern jurisprudence. The Supreme Court stated, speaking of the limitation on sovereign immunity:

> Nor does sovereign immunity bar all suits against state officers. Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State. . . . The rule, however, does not bar certain actions

> against state officers for injunctive or declaratory relief. Compare *Ex parte Young*, 209 U.S. 123, 28S.Ct. 441, 52 L. Ed. 714 (1908). . . . Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.

Alden, 119 S.Ct at 2266.

This Court finds that the *Ex parte Young* doctrine applies in this case and the suit against the individual Commissioners may proceed.

Jurisdiction over the Commission

Congressional Power to Abrogate Eleventh Amendment Immunity Through Powers Granted by Article I

The Commission argues that the Supreme Court made it clear in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), that Congress did not have the power to abrogate Eleventh Amendment Immunity through the powers granted by Article I of the United States Constitution. However, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 119 S.Ct. 2219 (1999), the Supreme Court set forth a two pronged test to determine when Congress has the power to condition state participation in a federal program on the state's waiver of immunity. First, Congress must be under no obligation to give the right

to the state, and the state must not have a right to participate in the program -- the offer must be a gratuitous one. Second, the activity that Congress is conditioning the waiver on must not be an otherwise lawful or permissible activity. *College Savings Bank,* 119 S.Ct at 2231. Implicit in the previous test is Congress's clear expression that participation in the federal program will require waiver of Eleventh Amendment immunity.

This Court finds that the Commission did not have a pre-existing right to participate in the ACT and that Congress did not have a duty to allow such participation. Furthermore, this Court finds that the actions allowed under the ACT are not otherwise lawful or permissible activities for the Commission. Thus, the

Telecommunications Act of 1996 meets the test set forth in *College Savings Bank* and Congress has properly conditioned participation in the ACT upon waiver of Eleventh Amendment immunity.

The Commission's Waiver of its Eleventh Amendment Immunity

As outlined above, this Court finds that participation under the ACT necessarily requires a waiver of Eleventh Amendment immunity. Thus, this Court finds that the Commission has waived its Eleventh Amendment immunity.

Scope of Jurisdiction

The Commission argues that if this Court found

that the Commission has waived its immunity, this Court's jurisdiction should be limited to whether the arbitration ruling complied with the ACT. This Court does not dispute that its jurisdiction on all claims arising under the ACT are limited to the scope outlined by the ACT. However, U S West is claiming a violation of due process under the Fourteenth Amendment and 42 U.S.C. § 1983.

In *College Savings Bank*, Justice Scalia reiterated that the Fourteenth Amendment is superior to the Eleventh Amendment in that the Fourteenth Amendment can properly abrogate Eleventh Amendment immunity. *College Savings Bank*, 119 S.Ct. At 2223. U S West's taking claims are not brought under the ACT, but under the Fourteenth Amendment

and 42 U.S.C. §1983. These are the appropriate channels for such claims and this Court has the proper jurisdiction to hear them.

III. CONCLUSION

For the foregoing reasons, **DEFENDANTS UTAH PUBLIC SERVICE COMMISSION and STEPHEN F. MECHAM, CONSTANCE WHITE, CLARK JONES, COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH'S MOTION TO DISMISS IS DENIED.**

Dated this 13th day of August, 1999.

BY THE COURT:

s Dale A. Kimball

United States District Judge

47 U.S.C. §251 *(in part)*

Interconnection.

(a) General Duty Of Telecommunications Carriers. – Each telecommunications carrier has a duty –

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations Of All Local Exchange Carriers. – Each local exchange carriers has the following duties –

(1) Resale. – The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number Portability. – The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing Parity. – The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have

nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access To Rights-of-Way. – The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal Compensation. – The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional Obligations Of Incumbent Local Exchange Carriers. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty To Negotiate. – The duty to negotiate in good faith, in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. – The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point

withing the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions, that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled Access. – The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combing such elements in order to provide such telecommunications service.

(4) Resale. – The duty –

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or

limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice Of Changes. – The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. – The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocations is not practical for technical reasons or because of space limitations.

(d) Implementation. – . . .

47 U.S.C. §252

Procedures for Negotiation, Arbitration, and Approval of Agreements.

(a) Agreements Arrived At Through Negotiation. –

(1) Voluntary Negotiations. – Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a bi9nding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections 9b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection 9e) of this section.

(2) Mediation. – Any party negotiating an agreement under this section may , at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements Arrived At Through compulsory Arbitration. –

(1) Arbitration. – During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a

request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of Petitioner. –

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning –

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to Respond. – A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.

(4) Action By State Commission. –

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may

require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal To Negotiate. – The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards For Arbitration. – In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulation prescribed by the Commission

pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection 9d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement,

(d) Pricing Standards. –

(1) Interconnection and Network Element Charges. – Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges For Transport And Termination And Termination Of Traffic. –

(A) In General. – For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of Construction. – This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that wiave mutual recovery 9such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale Prices for Telecommunications services. – For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service

requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval By State Commission. –

(1) Approval Required. – Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement with written findings as to any deficiencies..

(2) Grounds For Rejecting. – The State commission may only reject –

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that –

(i) the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulation prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation Of Authority. – Notwithstanding paragraph (2), but subject to section

253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule For Decision. – If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or withing 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission To Act If State Will Not Act. – If a State commission fails to act or carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review Of State Commission Actions. – In a case in which a State fails to act as described in paragraph (50, the proceeding by the Commission under such paragraph and any judicial revie2w of the

Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination undr this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements Of Generally Available Terms. –

(1) In General. – A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State Commission Review. – A State commission may not approve such statement unless such statement complies with subsection 9d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule For Review. – The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission –

(A) complete the review of such statement under paragraph (2) (including any

reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority To Continue Review. – Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty To Negotiate Not Affected. – The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation Of State Proceedings. – Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing Required. – A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to

the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability To Other Telecommunications Carriers. – A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunication carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition Of Incumbent Exchange Carrier. – For purposes of this section, the term 'incumbent local exchange carrier' has the meaning provided in section 251(h).

47 U.S.C. §253

Removal Of Barriers To Entry.

(a) In General. – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority. – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State And Local Government Authority. – Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption. – If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent

necessary to correct such violation or inconsistency.

(e) Commercial Mobile Service Providers. – Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers.

(f) Rural Markets. – It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply –

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) that effectively prevents a competitor from meeting the requirements of section 214(e)(1); and

(2) to a provider of commercial mobile services.

Utah Code Ann. §54-8b-2.1

54-8b-2.2 Interconnection.

(1) (a) (i) The commission may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.

(ii) Interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic. In determining unreasonable blocking or unreasonable restrictions, the commission shall, among other things, take into account the necessity and time required for adapting the network to respond to significant changes in usage patterns.

(b) (i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on

terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

(c) Nothing in this section shall prevent a telecommunications corporation from entering into nondiscriminatory agreements for interconnection with its essential facilities and the purchase and sale of essential services.

(d) (i) A telecommunications corporation shall file with the commission the prices, terms, and conditions of any agreement it makes for the interconnection of essential facilities or the purchase or sale of essential services.

(ii) The agreement shall take effect ten days after filing.

(iii) Each telecommunications corporation shall allow any other telecommunications corporation to obtain interconnection with its essential facilities and to purchase essential services on prices, terms, and conditions no less favorable than those on file with the commission.

(e) If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.

(f) It is not a discriminatory pricing practice to vary prices to reflect genuine cost differences.

(2) (a) The commission shall adopt rules or issue an interim order which implements by December 31, 1996, the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or interim order shall address those issues the commission determines are essential for a competing telecommunications corporation to provide intraLATA toll and local exchange services and necessary to protect the public interest, including the interconnection with essential facilities and the purchase and sale of essential services of telecommunications corporations authorized to provide public telecommunications services in the same or overlapping service territories on a nondiscriminatory and reasonably unbundled basis.

(3) (a) By December 31, 1997, the commission shall adopt additional rules or issue a final order to implement the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or final order shall address other issues relating to:

(i) competition for intraLATA toll and local exchange services;

(ii) blocking, timing of provisioning of unbundled elements, and service quality standards for interconnecting carriers;

(iii) the transition to a competitive market; and

(iv) the protection of the public interest.

(4) Nothing in this section shall require or prohibit the commission from ordering changes in

dialing patterns for intraLATA toll services.

(5) If the commission, by order, approves the application of a telecommunications corporation to provide public telecommunications services in all or part of the service territory certificated to an incumbent telephone corporation before the adoption of the rules or final order described in Subsection (3), the commission may:

(a) order the interconnection of essential facilities and the purchase and sale of the essential services of a telecommunications corporation with those of a competing telecommunications corporation on such terms and conditions and to the extent necessary to allow the competing telecommunications corporation to operate under authority granted by the commission; and

(b) address and resolve, by order, other issues necessary for the competitive provision of intraLATA toll and local exchange services.

Utah Code Ann. §54-8b-2.2

54-8b-2.2 Interconnection.

(1) (a) (i) The commission may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.

(ii) Interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic. In determining unreasonable blocking or unreasonable restrictions, the commission shall, among other things, take into account the necessity and time required for adapting the network to respond to significant changes in usage patterns.

(b) (i) Whenever the commission grants a certificate to one or more telecommunications corporations to provide public telecommunications services in the same or overlapping service territories, all telecommunications corporations providing public telecommunications services in the affected area shall have the right to interconnect with the essential facilities and to purchase the essential services of all other certificate holders operating in the same area on a nondiscriminatory and reasonably unbundled basis.

(ii) Each telecommunications corporation shall permit access to and interconnection with its essential facilities and the purchase of its essential services on

terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates.

(c) Nothing in this section shall prevent a telecommunications corporation from entering into nondiscriminatory agreements for interconnection with its essential facilities and the purchase and sale of essential services.

(d) (i) A telecommunications corporation shall file with the commission the prices, terms, and conditions of any agreement it makes for the interconnection of essential facilities or the purchase or sale of essential services.

(ii) The agreement shall take effect ten days after filing.

(iii) Each telecommunications corporation shall allow any other telecommunications corporation to obtain interconnection with its essential facilities and to purchase essential services on prices, terms, and conditions no less favorable than those on file with the commission.

(e) If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.

(f) It is not a discriminatory pricing practice to vary prices to reflect genuine cost differences.

(2) (a) The commission shall adopt rules or issue an interim order which implements by December 31, 1996, the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or interim order shall address those issues the commission determines are essential for a competing telecommunications corporation to provide intraLATA toll and local exchange services and necessary to protect the public interest, including the interconnection with essential facilities and the purchase and sale of essential services of telecommunications corporations authorized to provide public telecommunications services in the same or overlapping service territories on a nondiscriminatory and reasonably unbundled basis.

(3) (a) By December 31, 1997, the commission shall adopt additional rules or issue a final order to implement the competitive provision of facilities-based intraLATA toll and local exchange services.

(b) The rules or final order shall address other issues relating to:

(i) competition for intraLATA toll and local exchange services;

(ii) blocking, timing of provisioning of unbundled elements, and service quality standards for interconnecting carriers;

(iii) the transition to a competitive market; and

(iv) the protection of the public interest.

(4) Nothing in this section shall require or prohibit the commission from ordering changes in

dialing patterns for intraLATA toll services.

(5) If the commission, by order, approves the application of a telecommunications corporation to provide public telecommunications services in all or part of the service territory certificated to an incumbent telephone corporation before the adoption of the rules or final order described in Subsection (3), the commission may:

(a) order the interconnection of essential facilities and the purchase and sale of the essential services of a telecommunications corporation with those of a competing telecommunications corporation on such terms and conditions and to the extent necessary to allow the competing telecommunications corporation to operate under authority granted by the commission; and

(b) address and resolve, by order, other issues necessary for the competitive provision of intraLATA toll and local exchange services.